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IN THE

Supreme Court of the United States

October Term, 1963

No. 823

SHENANDOAH VALLEY BROADCASTING, INC., ET AL.,

Petitioners,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RALSTONE R. IRVINE
WALTER R. MANSFIELD
2 Wall Street
New York, New York

Counsel for Petitioners Shenandoah Valley Broadcasting, Inc., et al.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners*, the owners and operators of 364 domestic television stations, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on May 7, 1963.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, dated and filed on May 7, 1963, reprinted in Appendix B, *infra*, is reported in 317 F. 2d 90.

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* The names of all of the petitioners are set out in Appendix A, *infra*.

The opinion of the United States District Court for the Southern District of New York, filed on September 14, 1962, reprinted as Appendix C, *infra*, is reported in 208 F. Supp. 896.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was dated and entered on May 7, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

A consent decree entered in an action by the United States against respondent under the Sherman Act provides that, upon application by a music user for a music license, respondent shall quote a reasonable fee for the license requested, and that if the parties cannot agree upon the fee the applicant may apply to the United States District Court, Southern District of New York, to fix one. Petitioners applied to respondent for music licenses. When the parties were unable to agree upon a fee for the licenses requested, petitioners applied to the District Court to fix one. The District Court dismissed the application on the ground that petitioners were not entitled under the decree to the type of license they requested. When petitioners sought to take an appeal to this Court, the Court dismissed the appeal for "want of jurisdiction." Thereafter, when petitioners sought to prosecute an appeal to the Court of Appeals for the Second Circuit, that court dismissed petitioners' appeal on the ground that the Expediting Act invested this Court with exclusive appellate jurisdiction.

The questions presented are:

1. Whether the Expediting Act deprives the Court of Appeals of jurisdiction to hear the petitioners' appeal.

2. Whether petitioners, although not parties to the decree, have standing, as members of a class expressly accorded the right to apply to the District Court for certain relief thereunder, to appeal to the Court of Appeals from the District Court's judgment dismissing their application under the decree.

Statutes Involved

Rule 71 of the Federal Rules of Civil Procedure provides:

> When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party. 28 U. S. C. Rule 71.

Section 1291 of Title 28 of the United States Code provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, §48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, §2(e), 72 Stat. 348.

Section 2 of the Expediting Act provides:

> In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court. Feb. 11, 1903, c. 544, §2, 32 Stat. 823; as amended, 15 U. S. C. §29.

Statement of the Case

Respondent American Society of Composers, Authors and Publishers (referred to hereinafter as "ASCAP") is an unincorporated association of approximately 8,812 composers, authors and publishers of copyrighted music. ASCAP is and for many years has been in the business of issuing music licenses to music users, including television broadcasters (R. 154a-155a).[1]

An amended consent decree entered by the District Court for the Southern District of New York on March 14, 1950 in an action brought by the United States against ASCAP under the Sherman Act provides, *inter alia*, that ASCAP "is hereby ordered and directed to grant to any user making written application therefor a nonexclusive license to perform all of the compositions in the ASCAP repertory" (R. 32a); that ASCAP "shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested"

[1] Page references prefixed by the symbol "R." refer to petitioners' appendix filed in the Court of Appeals for the Second Circuit, which is Volume I of the record herein.

(R. 34a-35a); and that if the parties are unable to agree upon a reasonable fee, the applicant may apply to the District Court to fix one (R. 35a).

On October 18, 1961, in anticipation of the expiration on December 31, 1961 of licenses then in effect between ASCAP and petitioners, petitioners applied to ASCAP for licenses to perform compositions in the ASCAP repertory on television programs produced by them (R. 50a). The licenses applied for differed in some respects from the licenses previously in effect between petitioners and ASCAP (R. 50a-56a). ASCAP refused to quote petitioners a fee for the type of license requested (R. 66a-84a).

On December 18, 1961 petitioners made an application to the District Court for the Southern District of New York "at the foot of the ASCAP final judgment" (R. 46a) to have the District Court fix a reasonable fee on the licenses applied for by petitioners (R. 43a-49a). Petitioners invoked the jurisdiction of the District Court pursuant to Rule 71 of the Federal Rules to enforce rights extended to them by the foregoing provisions of the March 14, 1950 amended consent decree.

The District Court held that the decree did not empower it to grant the type of license requested by petitioners (Appendix C, *infra*). On October 10, 1962 the District Court entered an order and judgment dismissing petitioners' application (R. 7a-11a).

Petitioners took appeals from the judgment of the District Court both to the Supreme Court and to the Court of Appeals for the Second Circuit.

On December 13, 1962, ASCAP moved this Court to dismiss the direct appeal taken by petitioners to this Court, on the ground that the Expediting Act did not confer jurisdiction on this Court to entertain petitioners' appeal, contending that:

> "The purpose of the Expediting Act is to expedite the final resolution of cases brought by the United States under certain statutes prohibiting conduct that threatens vital public interests. During consideration of the bill that became the Expediting Act, this objection was made clear by Senator Fairbanks, who explained the purpose of the bill on the Senate Floor when he reported it out of the Committee on the Judiciary:
>
> > 'The far-reaching importance of the cases arising under anti-trust laws now upon statute books or hereafter to be enacted, and the general public interest therein, are such that every reasonable means should be provided for speeding the litigation. It is the purpose of the bill to expedite litigation of great and general importance. It has no other object.' 36 Cong. Rec. (Part II) 1679 (1903).
>
> "If this appeal can be taken under the Expediting Act, ASCAP and any and all of its more than 30,000 licensees can appeal directly to this Court from any determination of a license fee or a form of license made by the District Court under the Amended Final Judgment. Review of any such determination would inevitably require detailed consideration of massive amounts of technical data pertaining to, for example, the amount, type and identity of music used by the licensee and its importance in the licensee's operations. The Expediting Act does not contemplate that the energies of this Court be expended on matters of such great technical com-

> plexity and of such limited public interest." (*Motion of Appellee ASCAP to Dismiss the Appeal or to Affirm*, December 13, 1962, pp. 6-7).

In the alternative, ASCAP moved to affirm the District Court's judgment on the merits.

On January 14, 1963 this Court, in a per curiam decision, dismissed petitioners' appeal "for want of jurisdiction" (371 U. S. 540). Mr. Justice Black was of the opinion that probable jurisdiction should be noted.

ASCAP then moved to dismiss the appeal pending before the Court of Appeals for the Second Circuit. This motion was granted by the Court of Appeals on May 7, 1963, which held that:

> "The judgment here sought to be appealed from was entered in 'a civil action brought in [a] district court of the United States' under the Sherman Act, 'wherein the United States is complainant.' "
>
> • • •
>
> "[E]ven if we were to share the view of one Justice that the Supreme Court has been hasty in dismissing the appeal—which we in no way intimate—we should still see no way for appellants to escape the controlling force of the Expediting Act in routing all appeals from final judgments to the Supreme Court and in forbidding appeals from any others." (Appendix B, *infra*, pp. B5, B10).

Reasons for Granting the Writ

1. The decision of the Court of Appeals for the Second Circuit, dismissing petitioners' appeal on the ground that the Expediting Act invested this Court with exclusive appellate jurisdiction, conflicts with and misconstrues the January 14, 1963 decision of this Court dismissing petitioners' attempt to take a direct appeal to this Court under the Expediting Act for want of jurisdiction. 28 U. S. C. §1291 requires the courts of appeals to take jurisdiction of appeals from all final decisions of the district courts, "except where a direct review may be had in the Supreme Court". The October 10, 1962 judgment of the District Court is a final judgment and would, except for the possibility of a direct appeal to this Court, be appealable to the Court of Appeals. Petitioners' attempted direct appeal to this Court having been dismissed for want of jurisdiction, the Court of Appeals erred in refusing to consider the appeal on its merits.

The Court of Appeals was not warranted in concluding, despite this Court's dismissal of petitioners' direct appeal for want of jurisdiction, that the Expediting Act deprived it of jurisdiction to hear petitioners' appeal. In no case has this Court construed the Expediting Act to preclude appeals to the courts of appeals from judgments in ancillary proceedings brought by non-parties to a Government antitrust suit for the limited purpose of enforcing rights accorded to them under the terms of the final judgment. The appeal here differs from that of a non-party seeking to intervene in order to vacate or amend the final judgment itself (e.g., *United States* v. *California Cooperative Canneries*, 279 U. S. 553; *Sam Fox Publishing Co.* v. *United States*, 366

U. S. 683; and *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502), which is governed by the Expediting Act for the reason that allowing appeals in such cases to go to the courts of appeals would defeat the purpose of expediting the Government's main suit and would bring back opportunities for delaying a final adjudication that the Act was intended to avoid. *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558-59.

These considerations are inapplicable here. The present proceeding involves an essentially private controversy between petitioners and ASCAP. It was brought long after the entry of the final judgment in the Government antitrust suit, and pursuant to that judgment's express provisions, for the limited purpose of enforcing rights accorded to petitioners by the terms of that judgment. Thus, permitting the Court of Appeals to hear petitioners' appeal would not frustrate the purposes of the Expediting Act.

There is no warrant for the Court of Appeals' assumption that in dismissing petitioners' attempt to take a direct appeal under the Sherman Act, this Court must of necessity have passed on the merits of the case (Appendix B, *infra*, p. B10). The practice of this Court in dismissing appeals taken by persons seeking to intervene in pending actions, adverted to by the Court of Appeals, has no bearing on the present case. Denial of intervention, except where such intervention is one of right, is simply a refusal to permit the intervenor to join his independent claims with claims asserted by parties in the pending lawsuit. It leaves the intervenor free to assert his independent claims in a separate lawsuit. For this reason such an order can-

not be treated as a "final disposition" of the intervenor's claims. *Sam Fox Publishing Co. v. United States*, 366 U. S. 683, at pp. 694-95.

Petitioners are not would-be intervenors. As beneficiaries under the terms of the decree, they admittedly have standing to invoke the District Court's jurisdiction thereunder. They do not seek to intervene to assert independent rights under the antitrust laws. They seek to enforce their rights (pursuant to Rule 71) under the existing provisions of the decree itself. Since their claims are founded on the provisions of the decree, dismissal does not leave petitioners free to assert these claims in an independent lawsuit; and even if they proceeded by an independent suit under the antitrust laws, there is no basis for the assumption that such claims would be identical with, or measured by, their rights under the express provisions of the decree.

The inapplicability of intervention cases to the present type of proceeding was specifically recognized by ASCAP in its memorandum opposing petitioners' attempted direct appeal under the Expediting Act:

> "An order denying intervention to one entitled as a matter of right to intervene in a Government antitrust suit is wholly different from a license fee determination made by the District Court under the Amended Final Judgment. The granting of intervention in a Government antitrust suit makes the intervenor a party to the action itself, enabling him to present his views as to the merits of the claims and defenses or, if the action was or is to be resolved by consent, the form and adequacy of the relief to be embodied in the judgment. In contrast, the only right accorded to appellants and other

> ASCAP licensees under Section IX of the Amended Final Judgment is a judicial determination of a reasonable license fee. The exercise of that limited right does not involve the considerations of great public interest for which the Expediting Act was intended." (*Motion of Appellee ASCAP to Dismiss the Appeal or to Affirm*, pp. 7-8)

Furthermore, the decision of the District Court dismissing petitioners' application was based not on jurisdictional grounds but on the finding that the ASCAP decree did not entitle the petitioners to the particular relief sought.* If this Court had passed on the merits, it would have granted ASCAP's motion to affirm the District Court's decision rather than its motion to dismiss the appeal.

> "[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. . . . If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." (*Bell* v. *Hood*, 327 U. S. 678 at p. 682)

Even if petitioners were to be treated as intervenors, this Court, if it had passed on the merits of their claims and agreed with the District Court's interpretation of the ASCAP decree, would have affirmed that decision, not dismissed the appeal, for the reason that the decision appealed from involved a construction and application of the terms of the ASCAP decree. Compare *Allen Calcu-*

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* In fact, the District Court assumed jurisdiction and entered an order fixing interim fees and granting other relief to petitioners (R. 148a-150a).

lators, Inc. v. *National Cash Register Co.*, 322 U. S. 137 at pp. 142-43. The practice of this Court in such cases is exemplified by *Wometco Television and Theatre Co.* v. *United States*, 355 U. S. 40. There, a subsidiary of Loew's Inc., one of the defendants in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, applied to the district court under section III(7)(b) of a consent decree in that case (1952-3 CCH Trade Cases ¶67,228) for permission to acquire a theatre, upon a showing that such acquisition "will not unduly restrain competition." This permission was thereafter granted. Appellant Wometco, a competing theatre owner, sought, and was denied, leave to intervene in that proceeding. Wometco then took an appeal both from the order granting Loew's permission to acquire the theatre and from the order denying Wometco's intervention. This Court, faced not only with a nonreviewable order denying intervention but also with an appeal by Wometco from an order construing and applying the decree, signified its concurrence with the district court's rulings by affirming the decision below. The appeal in the present case involves an order construing and applying the provisions of the ASCAP consent decree, and would therefore be governed by the practice followed by this Court in cases such as *Wometco* if the Court had intended to confirm the District Court's decision on the merits.

2. This case presents an important question under the antitrust laws, which has not been, but should be, settled by this Court, i.e., whether non-party beneficiaries under an antitrust decree may appeal from a judgment dismissing their application for enforcement of decree provisions pur-

porting to grant them rights under the decree. There is continuing uncertainty as to whether or not petitioners in this type of ancillary proceeding have any right of appeal and, if so, whether their proper course is to go to the Supreme Court under the Expediting Act or to the Court of Appeals under 28 U. S. C. §1291. The history of the present case exemplifies this continuing uncertainty. Neither this Court's per curiam dismissal of petitioners' attempted direct appeal nor the Court of Appeals' later opinion resolves this question in a manner that will offer reliable guidance in future cases. The uncertainty is increased by the fact that the conclusions of the Second Circuit are in conflict with the views expressed by the Court of Appeals for the Third Circuit in *Magee-Hale Park-O-Meter Co.* v. *Vehicular Parking, Ltd.*, 180 F. 2d 897 at p. 900, which the Second Circuit expressly rejected (Appendix B, *infra*, p. B7).

Many antitrust decrees entered in recent years contain provisions allowing specified persons or classes of persons, not parties to the antitrust decree itself, to apply to the district court in which the decree was entered for enforcement of certain provisions thereof enacted for their benefit.* If such non-party beneficiaries cannot appeal an ad-

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* E.g., *United States* v. *Driver-Harris Co.*, 1961 CCH Trade Cases ¶70,031, sections V, VI (D. N. J. 1961); *United States* v. *New York Produce Exchange*, 1959 CCH Trade Cases ¶69,395, section IV (S. D. N. Y. 1959); *United States* v. *Robertshaw-Fulton Controls Co.*, 1957 CCH Trade Cases ¶68,592, section V (W. D. Pa. 1957); *United States* v. *Crown Zellerbach Corp.*, 1956 CCH Trade Cases ¶68,544, section VIII (N. D. Ill. 1956); *United States* v. *International Cigar Machinery Co.*, 1956 CCH Trade Cases ¶68,426,

(Continued on page 14)

verse decision of the district court in an ancillary proceeding, the beneficial effect of the many antitrust decrees granting such rights would seriously diminish. Another undesirable result would be to burden the Attorney General with the task of deciding whether or not to take appeals on behalf of petitioners aggrieved by decisions of the district courts in such proceedings, matters of concern only to the persons directly involved. The question whether such non-party beneficiaries have a right to appeal from

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(Continued from page 13)

section IV (S. D. N. Y. 1956); *United States* v. *Michigan Tool Co.*, 1956 CCH Trade Cases ¶68,290, section V (E. D. Mich. 1956); *United States* v. *Logan Co.*, 1956 CCH Trade Cases ¶68,375, section V (W. D. Pa. 1956); *United States* v. *General Shoe Corp.*, 1956 CCH Trade Cases ¶68,271, section VIII (M. D. Tenn. 1956); *United States* v. *American Linen Supply Co.*, 1956 CCH Trade Cases ¶68,542, section VIII (N. D. Ill. 1956); *United States* v. *General Railway Signal Co.*, 1955 CCH Trade Cases ¶67,992, section IX (W. D. N. Y. 1955); *United States* v. *Magcobar, Inc.*, 1955 CCH Trade Cases ¶68,023, section IV (S. D. Cal. 1955); *United States* v. *Eastman Kodak Co.*, 1954 CCH Trade Cases ¶67,920, section VI (W. D. N. Y. 1954); *United States* v. *Servel, Inc.*, 1954 CCH Trade Cases ¶67,665, section IV (E. D. Pa. 1954); *United States* v. *Cincinnati Milling Machine Co.*, 1954 CCH Trade Cases ¶67,733, section V (E. D. Mich. 1954); *United States* v. *Pittsburgh Crushed Steel*, 1954 CCH Trade Cases ¶67,892, section XIII (N. D. Ohio 1954); *United States* v. *Food Machinery and Chemical Corp.*, 1954 CCH Trade Cases ¶67,829, sections IV, V (N. D. Cal. 1954); *United States* v. *Hunter Douglas Corp.*, 1954 CCH Trade Cases ¶67,802, section V (S. D. Cal. 1954); *United States* v. *Bendix Aviation Corp.*, 1952-53 CCH Trade Cases ¶67,591, section V (S. D. N. Y. 1953); *United States* v. *Telescope Carts, Inc.*, 1953 CCH Trade Cases ¶67,573, section IV (W. D. Mo., 1953); *United States* v. *Bearing Distributors Co.*, 1953 CCH Trade Cases ¶67,595, section IV (W. D Mo. 1953); *United States* v. *Automatic Sprinkler Co. of America*, 1948-49 CCH Trade Cases ¶62,230, section IV (N. D. Ill. 1948); *United States* v. *White Cap. Co.*, 1948-49 CCH Trade Cases ¶62,268, section V (N. D. Ill., 1948).

adverse decisions of the district court in proceedings brought by them to enforce their rights under a decree is, therefore, of vital concern to the administration of the anti-trust laws.

The Court of Appeals suggested that one possible interpretation of the Supreme Court's dismissal of petitioners' direct appeal to the Supreme Court was that petitioners, not being parties to the ASCAP consent decree, have no standing to take an appeal from a decision under that decree (Appendix B, *infra*, p. B10). However, Rule 71 of the Federal Rules expressly provides that where an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party. Since a final order in an enforcement proceeding brought by a party to the decree would obviously be appealable by the losing side, no reason appears why a different result should obtain in the case of a final order in a proceeding under Rule 71. In other contexts it is now well-established that the right, by means of an ancillary proceeding, to obtain a construction and enforcement of the provisions of a decree previously entered by the court is not confined to the original parties to the action. *St. Louis-San Francisco R. Co.* v. *Byrnes*, 24 F. 2d 66 at pp. 70-71 (8th Cir.); *Cincinnati, I & W. R. Co.* v. *Indianapolis Union Ry. Co.*, 279 Fed. 356 (6th Cir.) at pp. 362-63. Even though not a party to the original action at the time of the final decree, the petitioner in such a proceeding has a right to appeal from an adverse decision of the district court. See, e.g., *Blossom* v. *Milwaukee Railroad Co.*, 1 Wall. 655; *St. Louis-San Francisco R. Co.* v. *Byrnes*, 24 F. 2d 66 (8th Cir.). No reason appears why a

contrary rule should apply in ancillary proceedings brought to enforce rights accorded to non-parties by the terms of a final decree in an antitrust suit.

A bill has recently been introduced in Congress to amend the provisions of the Expediting Act so as to give the courts of appeals appellate jurisdiction in most types of Government antitrust suits (88th Cong., 1st Sess., S. 1892). This bill does not bear on the status of non-party beneficiaries under final judgments in antitrust decrees, and would not resolve the question presented here.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RALSTONE R. IRVINE
WALTER R. MANSFIELD
Counsel for Petitioners
Shenandoah Valley
Broadcasting, Inc., et al.

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* If this petition is granted we will urge that the following additional question, concerning the merits of petitioners' appeal, be passed upon.

1. Whether petitioners are entitled under the ASCAP consent decree to the licenses requested by them and to have the District Court fix a reasonable fee therefor.

This question is not urged as a reason for granting the writ because it was not reached by the Court of Appeals.

APPENDIX A

Names of Petitioners for Writ of Certiorari

The A. S. Abell Co.; Abilene Radio & Television Co.; Aladdin Broadcasting Corp.; Alvarado Television Co., Inc.; Appalachian Broadcasting Corp.; Arizona Television Co.; Arkansas Radio & Equipment Co.; Arkansas Television Co.; Atlanta Newspapers, Inc.; Bakersville Broadcasting Co.; Beaumont Television Corp.; Bell Publishing Co.; A. H. Belo Corp.; Binghamton Press Company, Inc.; Biscayne Television Corporation; Bi-States Co.; Black Canon Broadcasting Co., Inc.; Black Hawk Broadcasting Co.; The Board of Curators of the University of Missouri; Brazos Broadcasting Co.; Broadcasting Co. of the South; The Brockway Company; California Northwest Broadcasting Co.; Capitol Broadcasting Co.; Capital Cities Broadcasting Co.; Carolina Broadcasting Co.; Carolina Broadcasting System, Inc.; Central Broadcasting Co.; Central Minnesota Television Co.; Central Plains Enterprises, Inc.; Central-South Sales Co.; Cherry Broadcasting Co.; Chronicle Publishing Co.; City of St. Petersburg, Fla.; Columbia Empire Broacasting Co.; Columbia Pictures Electronics Co., Inc.; Columbus Broadcasting Co., Inc.; Cook Broadcasting Co.; Cornhusker Television Corp.; Cowles Magazine & Broadcasting, Inc.; Crosley Broadcasting Corp.; Crosley Broadcasting of Atlanta, Inc.; Dickinson Radio Association; The Dispatch Printing Co.; Duhamel Enterprises, Inc.; El Mundo, Inc.; Eugene Television, Inc.; Evansville Television, Inc.; The Evening News Association; The Evening Star Broadcasting Co.; Express

Publishing Company; Fetzer Broadcasting Co.; Fetzer Television, Inc.; Fisher Broadcasting Company; Fisher's Blend Station, Inc.; Forest Capital Broadcasting Co.; Fort Meyers Broadcasting Co.; Frontier Broadcasting Co.; Georgia-Carolina Broadcasting Co.; Garryowen Butte Tv, Inc.; General Electric Co.; Glendive Broadcasting Corporation; Globe News Publishing Co.; The Goodwill Stations, Inc.; Greater Rockford Television Inc.; Great Lakes Television Co.; Great Western Broadcasting Corp.; Greensboro News Co.; Gulf Television Corp.; Guy Gannett Broadcasting Services; Harbenito Broadcasting Company; Hawaiian Broadcasting System, Limited; The Hearst Corp.; Herald Corp.; Herald Publishing Co., Inc.; Hirsch Broadcasting Co.; Houston Consolidated Television Co.; Houston Post Co.; Independent Broadcasting Co.; Indiana Broadcasting Corp.; Iowa State University; Jefferson Standard Broadcasting Co.; The Journal Co.; KCMC, Inc.; KCOP Television Inc.; KCRA, Inc.; KDAL, Inc.; KELP Television Corp.; Kentuckiana Television, Inc.; Kern County Broadcasting Co.; Key Television Inc.; KFBB Broadcasting Corp.; KGUN-TV, Inc.; KHQ, Incorporated; King Broadcasting, d/b/a Pioneer Broadcasting Company; KOGO Broadcasting Corp.; KOOL Radio-Television, Inc.; KOTV, Inc.; KREM Broadcasting Company; K-SIX Television, Inc.; KSLA-TV, Inc.; KSOO-Tv, Inc.; KTAR Broadcasting Co.; KTBS, Inc.; KTIV Television Co.; KTVB, Inc.; KTVE, Inc.; KUTV, Inc.; KWTX Broadcasting Co.; Lamar Life Broadcasting Co.; Las Vegas Television, Inc.; Lee Broadcasting, Inc.; Lee Radio, Inc.; Liberty Television Inc.; Louisiana Television Broadcasting Corp.; Loyola Uni-

versity; Lynchburg Broadcasting Corp.; McClatchy Broadcasting Co.; M & M Broadcasting Co.; Maine Radio & Television Co.; Marietta Broadcasting, Inc.; Martin Theatres of Georgia, Inc.; May Broadcasting Co.; Meredith Broadcasting Co.; Meredith Syracuse TV Corp.; Meredith WOW, Inc.; Metromedia, Inc.; Metropolitan Broadcasting Corp.; Metropolitan Broadcasting Corp. of California; Metropolitan Television Co.; Meyer Broadcasting Co.; Miami Valley Broadcasting Corp.; Michiana Telecasting Corp.; Midcontinent Broadcasting Co.; Midcontinent Broadcasting Co. of Wisconsin, Inc.; Mid-Continent Telecasting, Inc.; Midland Empire Broadcasting Co.; Mid-Florida Television Corp.; Mid-New York Broadcasting Corp.; Midwestern Broadcasting Company; Midwest Radio-TV, Inc.; Mission Telecasting Corp.; Modern Broadcasting Co. of Baton Rouge, Inc.; The Montana Network; Mountain City TV, Inc.; Mt. Hood Radio & Television Broadcasting Corp.; Mt. Mansfield Television, Inc.; Mt. Washington TV, Inc.; Nafi Telecasting, Inc.; New Mexico Broadcasting Co., Inc.; Newhouse Broadcasting Corp.; New Orleans Television Corp.; Noe Enterprises, Inc.; North Carolina Television, Inc.; North Central Broadcasting Co.; North Dakota Broadcasting Co., Inc.; Northeastern Penn. Broadcasting, Inc.; Northwest TV Co.; Oklahoma Quality Broadcasting Company; Oklahoma Television Corporation; Oregon Television, Inc.; The Outlet Company; Paducah Newspaper, Inc.; Palmetto Radio Corporation; Pembina Broadcasting Co.; Peninsula Broadcasting Corp.; Peoples Broadcasting Corp.; Petersburg Television Corp.; John H. Phipps Stations; Pikes Peak

Broadcasting Co.; Plains Television Corporation; Pulitzer Publishing Co.; Queen City Broadcasting Co.; Quincy Broadcasting Company; Radio Service Corp. of Utah; Redwood Broadcasting Co., Inc.; Reeves Broadcasting & Development Corp.; Richmond Television; RKO General, Inc.; Rocket City Television, Inc.; Rock Island Broadcasting Co.; Rollins Telecasting Inc.; Sarkes Tarzian, Inc.; Savannah Broadcasting Company, Inc.; Scranton Broadcasters, Inc.; Scripps-Howard Broadcasting Company; Scripps-Howard Radio, Inc.; Shasta Telecasting Corp.; Shenandoah Life Stations, Inc.; Shenandoah Valley Broadcasting, Inc.; Snyder & Associates; South Bend Tribune Newspaper; South Central Broadcasting Corp.; Southeastern Broadcasting Co.; Southeastern Ohio Television System; Southern Minnesota Broadcasting Co.; Southern Oregon Broadcasting Co.; Southern Television Corp.; Southland Industries, Inc.; South Mississippi Television Co.; Spartan Radiocasting Co.; Springfield Television Broadcasting Corp.; Standard Electronics Corp.; Standard Radio & Television Co.; Star Broadcasting Co., Inc.; Storer Broadcasting Co.; Summit Radio Corp.; Susquehanna Broadcasting Co.; Taft Broadcasting Co.; Television Broadcasters, Inc.; Television City, Inc.; Television Company of America, Inc.; Television Corp. of Michigan, Inc.; Television Muscle Shoals, Inc.; Television Wisconsin, Inc.; Texas Goldcoast Television, Inc.; Texas Telecasting, Inc.; Texoma Broadcasters, Inc.; Robert R. Thomas, Jr.; Tidewater Teleradio, Inc.; Time-Life Broadcast, Inc.; Times-Mirror Broadcasting Company; Times-World Corp.; Topeka Broadcasting Assoc., Inc.; Transcontinent

Television Corp.; The Travelers Broadcasting Service Corp.; Triangle Broadcasting Corp.; The Tribune Co.; Tribune Publishing Co.; Tri-Cities Broadcasting Company; Tri-City Broadcasting Co.; Tri-City Radio Corp.; Triple City Broadcasting Co.; Tri-State Broadcasting Co., Inc.; Truth Publishing Co., Inc.; Tulsa Broadcasting Co.; Turner-Farrar Association; TV Colorado, Inc.; Tv Denver, Inc.; Twin State Broadcasting, Inc.; Valley Telecasting Co.; Veterans Broadcasting Co., Inc.; Vindicator Printing Co.; Voice of the Caverns, Inc.; Wabash Valley Broadcasting Corp.; The Washington Post Co.; WATE, Inc.; WAVE, Inc.; WBEN, Inc.; WBRE-TV, Inc.; WCSC, Inc.; WDAY, Inc.; WDEF Broadcasting Co.; WDSM TV Co.; WDSU Broadcasting Corp.; WEHT, Inc.; West Central Broadcasting Co.; Western Slope Broadcasting Co., Inc.; Westex Television Co.; Westinghouse Broadcasting Co., Inc.; WFIE, Inc.; WGAL, Inc.; WGN, Inc.; WHAS, Inc.; WHEC, Inc.; WHP, Inc.; Wichita Television Corporation, Inc.; Wichtex Radio & Televis on Corp.; WIIC, Inc.; Winnebago Television Corporation; Wisconsin Valley Television Corp.; WISE-TV, Inc.; WJAC, Inc.; WJHL, Inc.; WKBH Television, Inc.; WKBN Broadcasting Corp.; WKJG, Inc.; WKRG-TV, Inc.; WKST, Inc.; WKY Television System, Inc.; WLAC-TV, Inc.; WLBZ Television, Inc.; WLOK, Inc.; WMC Broadcastng Co.; WMRC, Inc.; WMT-TV, Inc.; Wometco Enterprises, Inc.; WOOD Broadcasting, Inc.; WPIT, Inc.; WPIX, Inc.; WSAV, Inc.; WSM, Inc.; WSTV, Inc.; WTAR Radio-TV Corp.; WTRF-TV, Inc.; WTWV, Inc.; Zanesville Publishing Company.

APPENDIX B

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 317—October Term, 1962

Argued April 10, 1963 Decided May 7, 1963.

Docket No. 28086

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant-Appellee.

In the Matter of the Application

of

SHENANDOAH VALLEY BROADCASTING, INC., et al.,

Petitioners-Appellants,

For the Determination of Reasonable License Fees.

Before:

MOORE, FRIENDLY and HAYS, *Circuit Judges.*

Appeal by television stations from a judgment of the District Court for the Southern District of New York, Sylvester J. Ryan, Chief Judge, dismissing their application for a determination of reasonable fees for certain licenses sought from defendant pursuant to a consent de-

cree in a suit brought against defendant by the United States under the anti-trust laws. Dismissed for want of appellate jurisdiction.

WALTER R. MANSFIELD (Donovan, Leisure, Newton & Irvine, New York, N. Y.), (Ralstone R. Irvine and Helmut F. Furth of Counsel), *for Petitioners-Appellants.*

ARTHUR H. DEAN, New York, N. Y., (William Piel, Jr., Herman Finkelstein, Attorneys for Respondent-Appellee; Lloyd N. Cutler (Wilmer, Cutler & Pickering), Washington, D. C., and Frederick A. Terry, Jr. (Sullivan & Cromwell), New York, N. Y., of Counsel), *for Respondent-Appellee.*

JOEL E. HOFFMAN (Lee Loevinger, Assistant Attorney General, Robert B. Hummel, Attorney), *for the United States of America.*

FRIENDLY, *Circuit Judge*:

On March 14, 1950, the District Court for the Southern District of New York entered an amended consent decree in an action brought by the United States against the American Society of Composers, Authors and Publishers (ASCAP) under the Sherman Act.[1] The decree provided, *inter alia*, that ASCAP must "grant to any user making written application therefor an non-exclusive license to perorm all of the compositions in the ASCAP repertory," and

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[1] The suit was brought in 1941 and the original consent decree was entered that year. The nature and history of the litigation are sketched in *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683 (1961).

that "ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested." If the parties were unable to agree upon a reasonable fee, the applicant might move the District Court to fix one. ASCAP was bound to notify the Attorney General of any such motion, and had the burden "to establish the reasonableness of the fee requested by it."

Pursuant to these provisions, television stations have had a choice between two types of licenses to use ASCAP music on all their local (i.e., non-network) programs—a "blanket" license, under which they pay a fee based on the revenues from the entire group of programs covered by the license, and a "per-program" license, under which the fee is based only on revenues from those programs which actually use ASCAP music. In the fall of 1961 Shenandoah Valley Broadcasting, Inc., and the owners and operators of 363 other television stations applied to ASCAP for a new type of license that would cover only programs produced by them and would exclude not only network programs (which had always been excluded) but also prerecorded program material furnished by independent film producers—who would thus be obliged to make their own arrangements with ASCAP. ASCAP took the position that it was not obliged to grant this new form of license. After proceedings in the District Court, all conducted under the title of the original anti-trust suit, Chief Judge Ryan concluded that the amended consent decree did not give the applicants a right to the type of license requested, that the relief sought by them could be had only by an amendment of the decree "after hearings on a petition for such relief

by a party to the suit," and that they were not parties to the suit.

On October 10, 1962, judgment dismissing the application was entered; on December 7, 1962, applicants filed notices of appeal both to the Supreme Court, apparently pursuant to §2 of the Expediting Act, 32 Stat. 823 (1903), as amended, 15 U. S. C. §29, 49 U. S. C. §45, and to this Court. ASCAP promptly moved the Supreme Court to dismiss or affirm; the motion did not assert that the appeal should properly have been taken here.[2] On January 14, 1963, the Supreme Court entered a *per curiam* memorandum, 371 U. S. 540, reading:

> "The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.
>
> MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted."

Two months later ASCAP moved to dismiss the appeal to this Court for want of appellate jurisdiction; we directed that the motion be argued along with the merits. The United States, taking no position on the merits, supported the motion to dismiss. We think the motion must be granted.

Section 2 of the Expediting Act provides that "In every civil action brought in any district court of the United States" under the Sherman Act "or any other Acts having

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[2] Appellee did argue to the Supreme Court that "If this appeal can be taken under the Expediting Act, ASCAP and any and all of its more than 30,000 licensees can appeal directly to this Court from any determination of a license fee or a form of license made by the District Court under the Amended Final Judgment," and that "The Expediting Act does not contemplate that the energies of this Court be expended on matters of such great technical complexity and of such limited public interest," but this is hardly an argument for review in a court of appeals.

a like purpose • • •, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court." 49 U. S. C. §45. The judgment here sought to be appealed from was entered in "a civil action brought in [a] district court of the United States" under the Sherman Act "wherein the United States is complainant." There would be no profit to appellants in an argument that the judgment dismissing their motion to fix license fees was not a "final judgment of the district court." For our own jurisdiction under 28 U. S. C. §1291 is limited to "appeals from all final decisions of the district courts of the United States"; the Supreme Court has indicated, as we should have assumed in any event, that the standard of finality under the two statutes is the same, *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 306-309 (1962), so that if the judgment is not sufficiently "final" to warrant an appeal to the Supreme Court, it equally does not qualify under 28 U. S. C. §1291; and the appeal is within none of the exceptions to the rule of finality provided in 28 U. S. C. §1292. Moreover, the Expediting Act has been authoritatively construed not only to route appeals from all final judgments directly to the Supreme Court[3] but to forbid interlocutory appeals. In *United States* v. *California Co.-op Canneries, Inc.*, 279 U. S. 553, 558 (1929), after summarizing the "previous

[3] The "final judgment[s]" appealable to the Supreme Court under the Expediting Act are not limited to the principal judgment awarding or denying relief; they include certain orders prior to such a judgment, *e.g.*, orders denying applications for intervention as of right, *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502 (1941), and certain orders subsequent to such a judgment. See *Aluminum Co.* v. *United States*, 302 U. S. 230 (1937); and particularly *Terminal R.R. Ass'n* v. *United States*, 266 U. S. 17 (1924), involving an application by certain parties "to enforce rights claimed by them under the original decree."

opportunities for delay" incident to appeal first to the Court of Appeals and then to the Supreme Court—the mischief at which the Expediting Act was aimed, Mr. Justice Brandeis said:

> Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters * * * and it precluded the possibility of an appeal to either court from an interlocutory decree."

Later, *United States Alkali Export Ass'n* v. *United States*, 325 U. S. 196, 201-02 (1945), and *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212, 217 (1945), held that interlocutory orders of the district court in suits subject to the Expediting Act can be reached by extraordinary writs under 28 U. S. C. §1651 issued by the Supreme Court, where "sole appellate jurisdiction lies," 325 U. S. at 202—even when, as in the *De Beers* case, the order was a preliminary injunction ordinarily reviewable by a court of appeals under 28 U. S. C. §1292(a)(1). See also Hart & Wechsler, The Federal Courts and the Federal System (1953), at 1372.

Neither are appellants assisted by the two court of appeals decisions on which they rely. Our own decision in *United States* v. *St. Regis Paper Co.*, 285 F. 2d 607, 609-11 (2 Cir. 1960), aff'd, 368 U. S. 208 (1961), is inapposite. That was a suit by the United States under §9 of the Federal Trade Commission Act, 15 U. S. C. §49, for a mandatory injunction commanding a corporation to furnish reports to the Commission under §6(b) of the Act, and for assessment of the penalties provided in §10 for failure to do that. We held that although the Federal Trade Commission Act was an act "having a like purpose" to the Sherman Act, it would be unreasonable to read the

Expediting Act "to require a clear path from the district court to the Supreme Court of the United States" in an action that was merely a part of the investigatory stages preliminary to a Commission proceeding, any final order in which would be directly reviewable only in a court of appeals. The other case is *Magee-Hale Park-O-Meter Co.* v. *Vehicular Parking, Limited*, 180 F. 2d 897, 900 (3 Cir. 1950). There a Government anti-trust suit against Vehicular Parking had resulted in a district court decree, comparable to the one here, requiring the defendant to license its patents for reasonable royalties; subsequently, Magee-Hale had intervened in that suit and moved for summary judgment declaring the patents invalid. Meanwhile, Magee-Hale brought a separate action against Vehicular Parking seeking a judgment declaring the same patents invalid, and the Court of Appeals affirmed the dismissal of this action on the ground that the issue could be determined in the pending anti-trust suit. In the course of its opinion, the court of appeals said that if the district court, having denied or dismissed the motion for summary judgment, proceeded to fix reasonable royalties to be paid by Magee-Hale under the compulsory-licensing provision of the decree, "An appeal from such an order, if taken by Magee-Hale, will search the record and give to this court jurisdiction to test the validity of the order denying or dismissing Magee-Hale's motion for a summary judgment declaring the patents invalid." It is wholly unrealistic to take this remark as a considered determination that, despite the plainly contrary implications of *Terminal R. R. Ass'n* v. *United States*, 266 U. S. 17, 28 (1924), such an appeal would lie to the court of appeals rather than to the Supreme Court. Prompted by a question from the bench, counsel for ASCAP have fur-

nished us with copies of the briefs in Magee-Hale; they reveal no discussion of that issue, which, indeed, was hardly relevant. As our own experience has shown, *United States* v. *New York, N. H. & H. R. R.*, 276 F. 2d 525, 537 (2 Cir.), cert. denied, 362 U. S. 961 (1960), it is all too easy for a court of appeals, which exercises general appellate authority over final decisions of district courts, to forget, unless reminded by counsel, that a few such appeals are not its business. When an issue as to its role in appeals under the Expediting Act has been squarely presented, the Third Circuit has made its position plain. *Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. 2d 614 (3 Cir. 1939), cert. denied, 309 U. S. 687 (1940). Appellants' reliance on the statement in *Magee-Hale* is thus answered *a fortiori* by what Chief Justice Marshall said long ago: "No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the Court does not consider itself as bound by that case." *United States* v. *More*, 3 Cranch. (7 U. S.) 159, 172 (1805).

Appellants' main contention is that since, as they assert, their appeal is in fact from a "final judgment," the Supreme Court's dismissal "for want of jurisdiction" must be taken to mean that it was not within the Expediting Act, thereby permitting an appeal to this Court. They contend that there is no other rational explanation of the Supreme Court's action. Appellee and the United States find such an explanation in an analogy to the rule that appeals from orders denying merely permissive intervention will not be entertained. *City of New York* v. *Consolidated Gas Co.*, 253 U. S. 219 (1920); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137 (1951); *Sam Fox Publishing Co., Inc.* v. *United States*, 366 U. S. 683 (1961). Appellants reply that since the consent decree

expressly gave them, as music users, the right to invoke the district court's jurisdiction by applying for a license, they come within F. R. Civ. Proc. 71, providing that "When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party;" hence, they say, insofar as the intervention cases are relevant, the controlling principle is the one sustaining appealability where a court has denied intervention to a party entitled to intervene as of right. *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502 (1941); see *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19, 20 (1951).

Continuing the dialogue, appellee and the United States counter that the case is indeed like permissive intervention in the important respect "that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it." *Sam Fox Publishing Co.* v. *United States*, *supra*, 366 U. S. at 689. In such cases, it has been said that even though the denial of intervention effectively ends any opportunity for the would-be intervenor to assert his claim in the pending suit, it is not sufficiently "final" to be appealable because it leaves him free to seek the same relief in an independent action. *Cresta Blanca Wine Co.* v. *Eastern Wine Corp.*, 143 F. 2d 1012, 1015 (2 Cir. 1944); *Cameron* v. *President and Fellows*, 157 F. 2d 993, 997 (1 Cir. 1946).[4] Accordingly, the Supreme Court could well have regarded the judgment here as not final and thus as analogous to the

[4] This rationale does not seem wholly consistent with other statements that orders denying what was sought merely as permissive intervention may be appealable if an abuse of discretion. See 4 Moore, Federal Practice (1962), 102, and cases cited in fn. 2.

permissive intervention cases, on the basis that if the consent decree did not entitle appellants to the type of license requested, they were non-parties seeking a modification of the decree, whereas even if it did so entitle them, they are still free to assert their rights in an independent private anti-trust suit against ASCAP. To this appellants respond that since they *claimed* relief under the decree as a matter of right, denial of their claim would have led to affirmance of the district court's judgment rather than to dismissal for want of jurisdiction. As a matter of strict logic, the argument has a certain attractiveness. See *Cameron* v. *President and Fellows, supra,* 157 F. 2d at 997. But it ignores that in this area the issue of appealability has tended to fuse with the merits of the claim to be heard. See *Sam Fox Publishing Co., supra,* 366 U. S. at 687. Thus, even when a person appealing from the denial of his motion to intervene claims he was entitled to intervention not merely permissively but as of right, the Supreme Court, upon determining he was not entitled to intervene as of right, customarily will dismiss the appeal. *Allen Calculators, Inc.* v. *National Cash Register Co., supra; Sutphen Estates, Inc.* v. *United States, supra; Sam Fox Publishing Co.* v. *United States, supra.* Compare *Farmland Irrigation Co.* v. *Dopplmaier,* 220 F. 2d 247 (9 Cir. 1955). We cannot escape the conclusion that this, in effect, is what happened here. But even if we thought otherwise, and even if we were to share the view of one Justice that the Supreme Court had been hasty in dismissing the appeal—which we in no way intimate—we should still see no way for appellants to escape the controlling force of the Expediting Act in routing all appeals from final judgments to the Supreme Court and in forbidding appeals from any others.

Appeal dismissed.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of May one thousand nine hundred and sixty-three.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant-Appellee,

SHENANDOAH VALLEY BROADCASTING, INC., et al.,

Petitioners-Appellants.

Judgment of Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from the judgment of said District Court be and it hereby is dismissed.

A. DANIEL FUSARO
Clerk

United States Court of Appeals
Second Circuit
Filed May 7 1963
A. Daniel Fusaro, Clerk

APPENDIX C

Opinion of District Court

[Caption Omitted]

OPINION

RYAN, *J.*

This petition, filed by more than 335 local television stations situated throughout the United States, seeks fixation of a reasonable royalty for a license under Section IX(A) and (B) of the Amended Consent Judgment, entered on March 14, 1950 in the antitrust suit entitled *United States* v. *ASCAP*. While theoretically the petition is brought under the provisions of the decree for the fixing of fees, what it really seeks from ASCAP is a radically different license from that under which petitioners have been operating under the decree for the past twelve years and only secondly the fixing of a reasonable fee for such license.

The type of license sought is neither the blanket nor per program license described in the judgment. Petitioners would have a composite sort of license, containing a little bit of both, which would grant them the right to use any, some or all of the compositions of ASCAP's repertory on all their locally-originated broadcasts, while excluding from such license music performing rights for network programs and prerecorded material produced after February 28, 1962 by persons other than petitioners; as to those, petitioners would demand that the rights be secured, cleared and paid for at the source.

Petitioners made written application to ASCAP for such license and upon ASCAP's refusal to issue such license, they filed the petition now before us.

Opinion of District Court

The underlying and immediate question raised by this petition is the court's power under the decree to compel ASCAP to issue such license; until that is determined the question of a fee under such license is not reached.

It is petitioners' position that the power to fix reasonable fees encompasses the power to fix a type of license which the court finds to be reasonable; that this construction of the decree is justified by the objectives and purposes of the judgment and that consequently no amendment to the decree is necessary in order to grant the application.

The government is in accord with petitioners on the principle that if the court finds the type of license requested to be reasonable, it has the power to compel its issuance; it, however, expresses no opinion on the reasonableness of the license. And it is ASCAP's position that, apart from the express prohibitions and restrictions as to the types of licenses it may not force on an applicant and the affirmative duty it has to offer upon request by an applicant a choice of the types of license enumerated in the judgment, it is free to negotiate with an applicant for a particular kind of license on particular terms, and that, therefore, the court lacks power to direct the issuance of the license sought, irrespective of its reasonableness (which it strenuously disputes).

We agree with the position taken by ASCAP, for the mere fact that a particular license requested may be more reasonable than that which has been given in the past, does not impose upon ASCAP the duty to grant such license,

nor does it give the court additional powers not contained in the amended judgment.

Until 1949 ASCAP had granted royalty-free licenses to all television stations for the use of its repertory; this was in an endeavor to assist the stations and to enable the industry to gain stability. In 1948 ASCAP suggested that the television industry negotiate with it for television licenses. Local and network blanket television licensing agreements were made in 1949, 1954 and 1958; substantially the same provisions were contained in each agreement. The petitioners, all local stations, have operated and continue to operate under a local blanket license granting them the right to play the entire repertory of ASCAP on all locally-originated programs. For this license they pay a fee which is based on a percentage of their "net receipts from sponsors", excluding any transcribed programs which ASCAP licenses at the source. Petitioners, dissatisfied with this type of license, would have the court cast the burden of paying for the performance rights on the pre-recorded programs on the producers rather than on petitioners; a right and option which the producers now have under their decree and which ASCAP is compelled to grant them. ¶ V-B

Nowhere in the judgment is there any provision explicitly or impliedly requiring ASCAP to issue the type of license requested, and petitioners do not so urge. They do argue, however, that the granting of such license would further the objectives of the judgment as a whole whereas a denial would frustrate them, and that looking beyond the

exact wording of the decree, as a court of equity must, the power of this court to compel the issuance of the license sought is clear.

More specifically, petitioners in support of their application point to Sections VI and IX as giving this court "broad equitable powers" to grant the type of license they seek.

Section VI provides for the granting of a non-exclusive license to perform "all of the compositions in the ASCAP repertory." While this provision standing alone might lend itself to an interpretation that "all" could encompass a direction to grant licenses on "any or some" as desired by an applicant, when read with the sentence following it and with the other provisions of the judgment, particularly Section VII (B) and (C), it is clear that "all" refers to a license to include the entire repertory as distinguished from the other type of license which is limited to one or more specified compositions. The balance of this Section VI deals with just such a license.

The entire Section IX, which speaks of a fee for the "license requested" following application for a license on "any, some or all" of the compositions, deals with the procedure for determining reasonable license fees, not types of licenses. The words "license requested" do not mean that an applicant for a license is given the right under the decree to compel ASCAP to give any type of license it demands and have this court fix the fee. Each section of the Amended Judgment must be read and interpreted in the light of the entire judgment. (*Swift & Co.* v. *United*

States, 276 U. S. 311, 48 S. Ct. 311, 72 L. Ed. 587 (1928).) The words "license requested" do not remove the limitations as to the extent, type and nature of licenses found in the other provisions of the judgment.

In Section IV (E), ASCAP is restrained from negotiating with any motion picture theatre exhibitor for a license to exhibit movies that use its compositions. This section makes no mention of television broadcasters, who are in many respects similarly situated to the theatre exhibitors. It is plain that the television broadcasters were not intended to be included within the prohibitions of Section IV (E).

Section VII deals primarily with the computation of fees for radio and television broadcasting. Section VII (B) provides that ASCAP must issue per-program licenses, on written request, and that the stations be given an economic choice between per-program and blanket licenses—there its obligation ends. There is no mention made of any type of license other than per-program or blanket. Section VIII refers to "the various types of licenses", clearly a reference to Section VII (B) and the licenses there described, the economic choice between per-program and blanket licenses, and the fees therefor, and again no other type license is mentioned.

Petitioners urge that the type of license they seek would give greater effect to provisions of the Amended Judgment, which, they argue, is rendered ineffectual by the present type of broadcasting licenses. If this be so (and we make no finding either way), relief could only be

had by a reappraisal of the Amended Judgment to determine if a further amendment were warranted; this only after hearings on a petition filed for such relief by a party to the suit.

Petitioners were not parties to the judgment; they have petitioner only as beneficiaries under it and they may not under cover of the protection from discrimination afforded them under its provisions indirectly effect an amendment to that judgment so as to wrest from ASCAP a type of license it is now under no judicial compulsion to grant. Here we do not have a petition for modification of the consent judgment filed by a party to the judgment.

The petition will be entertained if petitioners so elect to proceed within ten (10) days from the date hereof, as one filed for fixation of reasonable fees on a renewal of the type of license that is now and for many years past has been held by them.

Dated New York, September 14th, 1962.

/s/ Sylvester J. Ryan
U. S. D. J.